MISSOURI COURT OF APPEALS
WESTERN DISTRICT

In re: FREDERICK W. THORNTON, III,

Petitioner,

v.

LARRY DENNEY, Warden,

Respondent.

DOCKET NUMBER WD77276
Date: March 17, 2015

Appeal from:
Dekalb County Circuit Court

Appellate Judges:
Writ Division: Alok Ahuja, C.J., and Joseph M. Ellis and Thomas H. Newton, JJ.

Attorneys:
Sean D. O'Brien, Kansas City, MO for petitioner
Andrew T. Bailey and Stephen D. Hawke, Jefferson City, MO for respondent

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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WD77276 Dekalb County

Frederick W. Thornton III pleaded guilty in October 2007 to driving while intoxicated (or "DWI"). The circuit court found Thornton to be a persistent offender because he had two prior convictions for driving while intoxicated. By finding that Thornton was a "persistent offender" with two prior DWI convictions, rather than a "prior offender" with one previous conviction, the circuit court enhanced Thornton's 2007 offense from a Class A misdemeanor to a Class D felony. Thornton was given a sentence which exceeded the statutory punishment for a Class A misdemeanor.

After Thornton pled guilty, the Missouri Supreme Court decided *Turner v. State*, 245 S.W.3d 826 (Mo. banc 2008). *Turner* held that DWI convictions of driving while intoxicated in municipal court, which resulted in the suspended imposition of sentence ("SIS"), could not be used to enhance DWI offenses. In Thornton's case, one of the convictions on which the circuit court relied to find him to be a persistent offender was such a municipal court, SIS disposition.

Thornton filed a petition for writ of habeas corpus, arguing that under *Turner*, he only had one prior DWI conviction which would be considered for enhancement purposes. Therefore, Thornton contended that he was merely a "prior offender," not a "persistent offender," and was guilty only of a Class A misdemeanor, but not a Class D felony.

WRIT OF HABEAS CORPUS GRANTED, PETITIONER'S CONVICTION OF CLASS D FELONY DRIVING WHILE INTOXICATED VACATED, AND CONVICTION OF CLASS A MISDEMEANOR DRIVING WHILE INTOXICATED SUBSTITUTED THEREFOR.

Writ Division holds:

The State concedes that, if Thornton is entitled to raise the *Turner* issue, and if *Turner* applies to his 2007 conviction, then he was erroneously convicted of a Class D felony. The State argues, however, that Thornton is not entitled to habeas corpus relief for two reasons: *first*,

because he should have raised the *Turner* issue in a timely motion for post-conviction relief under Supreme Court Rule 24.035; and *second*, because *Turner* should not be applied "retroactively" to Thornton's 2007 conviction, which is now final. We reject both of the State's arguments.

The fact that Thornton could have raised the *Turner* issue in a timely post-conviction relief motion is irrelevant. Missouri law is well-settled that the imposition of a sentence beyond that permitted by the applicable statute or rule may be raised by way of a writ of habeas corpus, even if the habeas petitioner could have raised the claim earlier in a direct appeal or post-conviction relief proceeding. We applied this principle to the very same *Turner* issue raised by Thornton in *State ex rel. Koster v. Jackson*, 301 S.W.3d 586, 590 (Mo. App. W.D. 2010), and we do likewise here.

This case does not involve a "retroactivity" issue. Instead, it involves a post-conviction judicial decision (*Turner*) interpreting a statute (§ 577.023, RSMo) which was in effect at the time of Thornton's conviction. Section 577.023 was in effect at the time of Thornton's guilty plea – it is not being applied retroactively. Moreover, the Missouri Supreme Court has held that "[i]n *Turner*, this Court made no new law; it merely clarified the language of an existing statute." *State v. Severe*, 307 S.W.3d 640, 642-43 (Mo. banc 2010). Where Thornton's petition relies on a judicial opinion interpreting a statute which was in effect at the time of his conviction, and that judicial opinion "created no new law," no retroactivity issue arises.

Accordingly, Thornton was not subject to conviction of a Class D felony in connection with his 2007 offense, and we accordingly order that Thornton be discharged and relieved from his 2007 conviction of a Class D felony, and from the execution of any sentence associated with that conviction. The record of Thornton's 2007 conviction shall be amended to reflect his conviction of Class A misdemeanor driving while intoxicated.

Before: Writ Division: Alok Ahuja, C.J., and Joseph M. Ellis and Thomas H. Newton, JJ.

Opinion by: Alok Ahuja, Judge **March 17, 2015**